STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 16, 2001
v	No. 217950 Wayne Circuit Court
DONALD ARTHUR MARTIN, Defendant-Appellant.	LC No. 98-009401

Before: Markey, P.J., and Whitbeck and J. L. Martlew*, JJ.

PER CURIAM.

Defendant Donald Martin appeals as of right from his convictions of three counts of first-degree criminal sexual conduct (CSC I),[1] one count of second-degree criminal sexual conduct (CSC II),[2] and one count of first-degree home invasion,[3] entered after a jury trial. We affirm.

I. Basic Facts

Melvin Colbert performed maintenance work at the apartment building in Detroit in which the ninety-seven-year-old complainant lived. According to Colbert, when he went to the complainant's apartment to fix a leaking faucet, he found the complainant lying in bed. The room had been disturbed; a side table had been knocked over and a sheet with blood on it was on the floor. When he spoke to the complainant, she began to cry. Colbert noticed that the complainant had been bleeding, had an injured lip, and a knot on her forehead. Then he asked the complainant what was wrong. She replied that a man from apartment 911 had entered her apartment and raped her over the course of a twelve-hour period, penetrating her vagina and anus with his penis, tongue, and finger.

The complainant confirmed the course of events that Colbert related when she testified at trial. She stated that Martin worked for the woman who lived in apartment 911 and that he was

[1] MCL 750.520b(1)(f); MSA 28.788(2)(1)(f).

[2] MCL 750.520c(1)(f); MSA 28.788(3)(1)(f).

[3] MCL 750.110a(2); MSA 28.305(a)(2).

* Circuit judge, sitting on the Court of Appeals by assignment.

the person who assaulted her. She added that Martin had also fondled her breasts, he was violent during the encounter, he fell asleep in her bed after the assault, and she neither gave him permission to enter her apartment nor to touch her. Her testimony concerning what occurred in her apartment was consistent with the signed statement Martin provided to the police, which said:

> [The complainant] she tried very hard for myself (Donald Martin) to make love to her. We lied together, but all I did was put my finger in her vagina. She tried to get me to stay all night because she knew I didn't have a key to get in my apartment, but I left. I also touched her breasts.

At trial, Martin claimed that when went to the complainant's apartment to borrow money, she granted him permission to enter and asked him to spend the night with her. He said she asked him to carry her to the bedroom, and when she began kissing him, he tried to leave. However, the complainant became angry when he could not finish a sex act. Martin maintained that he left the apartment without raping the complainant and that he did not touch her other than to kiss her. He conceded that he told the police that he penetrated the complainant's vagina with his finger because he wanted to tell the truth.

II. Excited Utterances

A. Standard Of Review

Martin argues that the trial court erred in admitting the complainant's statement to Colbert as an excited utterance and that the error cannot be considered harmless. We review a trial court's determination of an evidentiary issue for an abuse of discretion.[4] However, the initial question of whether a particular statement is admissible under the court rules is actually a question of law, subject to review de novo.[5]

B. The Excited Utterance Exception

The complainant's statement to Colbert was a classic example of hearsay because the complainant made the statement in her apartment, not in court, and the prosecutor introduced the statement to prove that it was true, i.e., that Martin sexually assaulted her.[6] Hearsay is not admissible at trial unless there is an explicit exception in the rules of evidence making it admissible.[7] One of these exceptions to the rule against hearsay is for an "excited utterance,"[8]

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[4] *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998).

[5] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[6] MRE 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); see also *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994) ("Under the orthodox definition of hearsay, an out-of-court statement offered for the truth is inadmissible, whether offered through its maker or a third party.").

[7] MRE 802.

which is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[9] The prosecutor contended, and the trial court agreed, that the complainant's statement to Colbert fit within this excited utterance exception. Thus, our analysis necessarily entails determining whether the trial court properly concluded that her statement was an excited utterance.

Three criteria determine whether a hearsay statement is admissible as an excited utterance:

> "(1) . . . [T]here is a startling occasion, startling enough to produce nervous excitement, and render the utterance spontaneous and unreflecting; (2) that the statement must have been made before there has been time to contrive and misrepresent; and (3) the statement must relate to the circumstances of the occurrence preceding it."[10]

This exception "does not contemplate a sequence in which the utterance necessarily follows immediately on the startling event, just as it does not contemplate admission of a statement made while under control, even though made contemporaneously."[11] Nevertheless, an excited utterance is inadmissible absent independent proof, direct or circumstantial, that the underlying event took place.[12]

C. Startling Events

In this case, the sexual assault against the complainant in her own home was, from anyone's perspective, a startling event. The statement that the complainant made to Colbert clearly concerned the startling event. Accordingly, Martin does not challenge either of these criteria. Rather, he focuses his argument on the second criterion, contending that the complainant's statement was contrived because she had "plenty of time to reflect on how she could fabricate her accusations." Further, he claims, the statement was not made spontaneously because it was in response to Colbert's question.

Case law generally states that the amount of time that lapses between the startling event and the resulting statement is relevant in determining whether the declarant was still under the stress of the event.[13] However, the length of this period does not determine whether a statement is admissible; the declarant's state of mind, i.e., whether she lacks the capacity to fabricate the

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(…continued)

[8] MRE 803(2).

[9] MRE 803(2).

[10] *People v Cunningham*, 398 Mich 514, 519; 248 NW2d 166 (1976), quoting *Rogers v Saginaw B C R Co*, 187 Mich 490, 493-494; 153 NW 784 (1915).

[11] *People v Straight*, 430 Mich 418, 424, 424 NW2d 257 (1988).

[12] *People v Burton*, 433 Mich 268, 282; 445 NW2d 133 (1989).

[13] *People v Layher*, 238 Mich App 573, 583; 607 NW2d 91 (1999).

statement, determines whether a statement fits within this exception to the rule against hearsay.[14] Physical factors may prolong the period in which the startling event continues to influence the declarant's ability to fabricate a statement, making the statement admissible.[15] A number of these factors are present in this case. The complainant was frail, very old, she had been physically injured, she had been rendered unconscious for some time, and her crying revealed that she was still under the stress of the assault when she made the statement. She also apparently had been unable to seek assistance after the assault, forcing her to wait until Colbert arrived to obtain help. There may be other cases when several hours may allow a person who is capable of fabricating an allegation to do so. However the circumstances of this case indicate that the complainant lacked the capacity to do so before she spoke to Colbert.

Martin's contention that the statement was inadmissible because Colbert elicited it through questioning is without merit. The rules of evidence attempt to ensure that hearsay statements introduced as evidence are trustworthy.[16] Thus case law holds that a trial court errs when it admits a hearsay statement elicited through *suggestive* questioning.[17] However, no rule of law automatically bars a trial court from admitting an excited utterance made after a nonsuggestive or open-ended question.[18] The question Colbert asked of the complainant, whether anything was wrong, did not prompt her to give any particular answer; it merely allowed her to express what, if anything, was concerning her. As a result, we conclude that the trial court did not abuse its discretion when it admitted this statement.

D. Harmless Error

Even if, however, we were to conclude that the trial court erred in admitting the statement, this error would be harmless. The complainant gave direct testimony regarding the incident and identified Martin as the perpetrator. Physical evidence also supported the complainant's testimony. From this evidence the jury could find beyond a reasonable doubt that Martin committed the charged offenses. Martin has not demonstrated that this alleged error was

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[14] *Id*., quoting *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998).

[15] *Smith*, *supra* at 552-554 (stress of startling event persisted for ten hours leading up to statement, making statement regarding sexual assault admissible); *People v Kowalak (On Remand)*, 215 Mich App 554, 556, 558-559; 546 NW2d 681 (1996) (forty-five minute delay did not render statement regarding death threat inadmissible); *People v Soles*, 143 Mich App 433, 438; 372 NW2d 588 (1985) (severe physical injuries made the child's statement after five days admissible because the injuries played a role in the continuing stress); *People v Thomas*, 14 Mich App 642, 645, 647; 165 NW2d 879 (1968) (being unconscious prevented declarant from fabricating statement and prolonged the effect of the startling event).

[16] See, generally, MRE 803(24).

[17] See *Straight*, *supra* at 425-426; *People v Hackney*, 183 Mich App 516, 525; 455 NW2d 358 (1990); *People v Creith*, 151 Mich App 217, 224; 390 NW2d 234 (1986).

[18] See *Smith*, *supra* at 553-554; *Layher*, *supra* at 584; *People v Hungate*, 27 Mich App 496, 498-499; 183 NW2d 634 (1970).

more likely than not to affect the outcome of his trial, which is the level of prejudice necessary to reverse a criminal conviction for nonconstitutional error.[19]

III. Disproportionate Sentencing

Martin argues that the trial court erred when it sentenced him because his minimum prison sentences of twenty-five years for his CSC I convictions are disproportionate to his circumstances and those surrounding the offense.[20] We disagree.

Martin's twenty-five-year minimum terms were within the sentencing guidelines, and thus are presumptively proportionate.[21] Martin's age, sixty-two or sixty-three at the time of sentencing, does not mandate a conclusion that his twenty-five-year prison terms are erroneous merely because he may not live long enough to be eligible for parole or release. As the Michigan Supreme Court said in *People v Lemons*:[22]

> Persons who are sixty years old are just as capable of committing grievous crimes as persons who are twenty years old. We find no principled reason to *require* that a judge treat similar offenses that are committed by similarly depraved persons differently solely on the basis of the age of the defendant at sentencing where the Legislature has authorized the judge to impose life or *any* term of years. A judge may, however, consider a defendant's age at sentencing in deciding whether the sentence about to be imposed is proper, just as the judge considers the recommended range under the guidelines and any other factors not expressly prohibited by law.

With the principle of proportionality as our guide in analyzing this issue,[23] we cannot help but note the particularly severe nature of this offense. Martin entered the apartment of a ninety-seven year-old woman who trusted him. He not only sexually assaulted her over the course of a twelve-hour period, he also physically injured her. We are unaware of any mitigating circumstances surrounding him or the offense that would make these twenty-five-year minimum prison terms disproportionate.

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew

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[19] *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

[20] *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

[21] *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997).

[22] *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997).

[23] *People v Kelly*, 213 Mich App 8; 539 NW2d 538 (1995).